> law regulating the taking of private property for public and private use, as referred to in Section 14 of Article I of this constitution.

Id. at 2079-80.

Article XV, § 3 has been amended once, which was in 1927, as proposed by S.L. 1927, p. 591, H.J.R. No. 13, which resolution provided in pertinent part:

> Be It Resolved by the Legislature of the State of Idaho:
>
> Section 1. That the first sentence of Section 3 of Article XV of the Constitution of the State of Idaho be amended to read as follows:
>
> 'Article XV, Section 3. The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, *except that the State may regulate and limit the use thereof for power purposes*.'
>
> Sec. 2. The question to be submitted to the electors of the State of Idaho at the next general election in order to determine whether they approve or reject the amendment proposed in Section 1, shall be as follows:
>
> 'Shall Section 3 of Article XV of the State Constitution be so amended as to provide that the State may regulate and limit the use of the unappropriated waters of any natural stream for power purposes?'

1927 Idaho Laws 591-92 (emphasis in original).

The proposed amendment was ratified at the general election in November, 1928, and Article XV, § 3 was so amended to allow the State to regulate and limit the use of the unappropriated waters of any natural stream for power purposes.

III. Principles of Constitutional Interpretation

One issue to address for purposes of examining the prior appropriation doctrine is the proper method of interpreting the Idaho Constitution.

What is the Idaho Constitution? The first step in this analysis is to address the question of "what is the Idaho Constitution?" The Idaho Supreme Court has previously answered that inquiry. In Blackwell Lumber Co. v. Empire Mill Co., 28 Idaho 556, 155 P. 680 (Idaho 1916), the Idaho Supreme Court stated:

> What is the Constitution of Idaho, anyway? It is the supreme law of the state formed by the mighty hand of the people themselves, in which certain fixed principles of fundamental law are established. It contains the will of the people, and is the supreme law of the state.

Blackwell Lumber Co., 28 Idaho at 580. The Constitution is the supreme law of the state.[8]

The meaning of the Idaho Constitution does not change over time. A recognition that the Idaho Constitution establishes "certain fixed principles of fundamental law" and is "the supreme law of the state" has a necessary implication. For the Constitution to establish *fixed* principles and for it to be the *supreme law* of the state, its meaning cannot change over time. If courts [or an administrative agency] can re-interpret it to mean something other than originally intended, then its principles are no longer fixed and it is no longer the supreme law of this state. Rather, the courts would become the supreme law of this state. The Idaho Supreme Court acknowledged this principle in Girard v. Diefendorf, 54 Idaho 467, 34 P.2d 48 (Idaho 1934):

> A constitution is not to be made to mean one thing at one time and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. ... The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.

Girard, 54 Idaho at 474-75 (internal citations omitted).

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[8] This statement is obviously subject to the provisos of Article I, § 3, that the "Constitution of the United States is the supreme law of the land" and in Article 6, § 2 of the United States Constitution that it, federal laws, and treaties are the supreme law of the land. This case, however, does not concern any conflict between federal law or treaties and state law.

Construing the Idaho Constitution contrary to its meaning when adopted would be **usurping the authority of the people**. The Idaho Constitution provides, "All political power is inherent in the people." Idaho Const. Art. I, § 2. The people of Idaho adopted the Constitution, and it "can be revoked, nullified, or altered only by the authority that made it." Blackwell Lumber Co., 28 Idaho at 580. The people have reserved unto themselves the sole power to amend the Constitution. Idaho Const. Art. XX §§ 1-4. "The court has no more power to amend the Constitution than has the Legislature, and *vice versa*." Straughan v. City of Coeur d'Alene, 53 Idaho 494, 501, 24 P.2d 321, 323 (Idaho 1932) (emphasis in original). A court that "giv[es] to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty..." Girard, 54 Idaho at 474. "If [the Constitution] is to be amended, the amendment should come from the people in the constitutional manner and not by way of judicial construction." Feil v. City of Coeur d'Alene, 23 Idaho 32, 58, 129 P. 643, 652 (Idaho 1912).

Based upon the forgoing the Idaho Constitution must be construed according to the intent of the framers. "In construing the constitution, the primary object is to determine the intent of the framers." Williams v. State Legislature, 111 Idaho 156, 158-59, 722 P.2d 465, 467-68 (Idaho 1986). That principle of construction simply flows from the fact that the Constitution had a fixed meaning when it was drafted by the delegates to the constitutional convention and then adopted by the people. The delegates did not simply choose nice-sounding words and phrases that had no meaning to them. It is obvious from reading the proceedings of their debates that they took their task seriously. The intentions of many of the delegates were expressly stated. In the end, they understood the meaning of the provisions that they drafted, debated, amended,

and ultimately approved. When construing the Constitution, therefore, a court's task is simply to determine what the delegates understood the constitutional provision at issue to mean; i.e. determine the intent of the framers.

The Idaho Supreme Court is the final authority in construing the Idaho Constitution.

IV. Idaho Code § 42-602 and 603 as it relates to the Constitutional interpretation of Article XV, § 3.

Idaho Code § 42-602 reads:

> The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps, and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director.
>
> **The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine.** The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

Idaho Code § 42-602 (WEST 2006) (emphasis mine).

Idaho Code § 42-603 reads:

> **The director** of the department of water resources **is authorized to adopt rules and regulations for the distribution of water** from the streams, rivers, lakes, ground water and other natural water sources **as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof.** Promulgation of rules and regulations shall be in accordance with the procedures of chapter 52, title 67, Idaho Code.

Idaho Code § 42-603 (WEST 2006) (emphasis mine).

Because this Court is charged with determining the intent of the framers, and because the Director is only authorized to adopt rules for administration which are in accordance with the prior appropriation doctrine, an examination of the adoption of Idaho's version of that doctrine is

necessary. More particularly, a tracing of the events actually serves two (2) primary purposes: the tracing reveals what ended up in the Constitution, and why; the tracing also reveals what did not end up in the Constitution, and why.

V. The Idaho Constitutional Convention and Article XV.

In addition to the above, and because questions of constitutional interpretation are presented, this Court includes certain portions of the proceedings of the Constitutional Convention of Idaho to trace the crafting of section 3; the section in which Idaho's version of the doctrine of prior appropriation became firmly rooted in Idaho's Constitution.

According to I.W. Hart, the Editor and Annotator of the publication of the Proceedings and Debates of the Constitutional Convention of 1889, all of the proceedings of the Convention were reported stenographically, at the time, by a very competent reporter, whose notes were filed with the Secretary of the Territory of Idaho. Proceedings and Debates, Preface at iii.[9]

However, certain records of the Convention were not preserved, namely the works of the respective standing committees which drafted, and then in due course, reported the various constitutional articles out to the whole Convention. According to I.W. Hart, these reports of the various article committees were in printed form with numbered lines, which numbers are frequently referred to in the reported proceedings of the whole Convention. None of these printed forms were preserved, thus in a few instances causing some difficulty in determining the exact places where amendments were offered within the various sections as discussed in the final publication of the proceedings. Id., preface at iv-v.

The actual publications of the Proceedings and Debates of the Constitutional Convention of Idaho, 1889 were ultimately made under authority of the Act of March 10, 1911, enacted to

[9] For purposes of clarity, it is helpful to note that Volume I ends at page 1024, and Volume II begins at 1025.

complete the transcripts of the stenographer's notes. Id., preface at iii; see also, 1911 Idaho Session Laws 686.

The completed publication consists of two volumes edited in 1912 by I.W. Hart, Clerk of the Supreme Court of Idaho, and is entitled Proceedings and Debates of the Constitutional Convention of Idaho, 1889. Proceedings and Debates at title page.

The Convention to draft the Constitution for the State of Idaho was convened July 4, 1889, (day one) in Boise City, Idaho. Id. at 1.

The drafting of the constitutional article on water rights was first assigned to the standing committee on Manufactures, Agriculture and Irrigation, which standing committee submitted its work in the form of a report to the Committee of the Whole Convention, on July 18, 1889, the twelfth day of the Convention. Id. at 52, 68, 182, 201. The Committee relied heavily on the experiences and history of the surrounding states of Utah, Colorado, and California. Id. at 1120-21.

The Committee of the Whole (Convention) first took up Article XV – Water Rights – on July 26, 1889, the nineteenth day of the convention. Id. at 1058, 1115.

Of interest to this Court is the fact that Section 1 and Section 2 of Article XV were read, voted upon and initially adopted with no discussion from the Committee of the Whole. Id. at 1115.[10] Section 1 and 2 of Article XV read as follows:

SECTION 1

> The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulation and control of the state in the manner prescribed by law.

[10] However, Section 1 and its purpose were subsequently discussed as to whether "vested rights" could be taken. Id. at 1343-48.

Id. at 2079.

SECTION 2

> The right to collect rates or compensation for the use of water supplied to any county, city, or town, or water district, or the inhabitants thereof, is a franchise, and can not be exercised except by authority of, and in the manner prescribed by law.

Id.

The section originally numbered Section 4, as reported out from the standing committee, was stricken/deleted in its entirety, and the remainder of the sections (then re-numbered, i.e. 5 became 4, 6 became 5, and 7 became 6) commanded relatively little discussion.[11] See id. at 1176-85.

However, Article XV, Section 3, which contains the prior appropriation doctrine and its parameters, was discussed and debated at length, over several different days[12], and is reported in at least the following locations in Volume II of the Proceedings and Debate of the Constitutional Convention of Idaho, 1889, pages:

1114-1148

1154-1176

1183

1185

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[11] The purpose of sections 1, 5, and 6 was debated and expressed several days later. Id. at 1352.

[12] 1. July 25, 1989, Thursday, was the eighteenth day of the convention and is reported at Volume I, pages 901 through 1024 and Volume II, pages 1025-1058.

2. July 26, 1889, Friday (an apparent typographical error lists this as Saturday on page 1088) was the nineteenth day, and is reported at Volume II, pages 1058-1188.
3. July 27, 1889, Saturday, was the twentieth day, reported at Volume II, pages 1188-1276.
4. July 29, 1889, Monday, was the twenty-first day, reported at Volume II, pages 1276-1407.
5. July 30, 1889, Tuesday, was the twenty-second day, reported at Volume II, beginning on page 1407.
6. August 6, 1889, the twenty-eighth day, was reported at Volume II, beginning on page 2029; the Constitution was signed, page 2041; and the Convention adjourned, *sine die*, at page 2046.

1237-1239

1331-1333

1340-1365

1407.

As noted earlier, the records and papers of the standing committees were not preserved. Id., preface at iv-v. However, by reading the debate as reported in the pages referenced immediately above, this Court has been able to reconstruct Section 3 of Article XV as it was initially reported out from the Standing Committee on Manufactures, Agriculture and Irrigation. When first presented to the Committee of the Whole, Section 3 read as follows:

> The right to appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

Id. at 1117, 1140, 1141, and 1143.

On July 26, 1889, the first day Article XV was considered by the whole convention, an argument immediately ensued over the preferences contained in the proposed Section 3. It started like this:

> SECTION 3
>
> Section 3 was read, and it is moved and seconded that section 3 be adopted.
>
> Mr. SHOUP. Mr. Chairman, I don't exactly understand that section, and if the chairman of the committee is present I would like to have him explain it. **I understand by the reading of it that agriculture has the preference over mining.**

> Mr. CHANEY. Over manufacturing.
>
> Mr. SHOUP. If any person or company has been using this water for mining, and any person desires to use it for agriculture, they shall have the preference over those using it for mining?
>
> The CHAIR. I don't know that the chairman of the committee is present. **I will say to the gentleman that I was on the committee, and the object of putting in that clause was, that where** water had been used for the three purposes from one ditch, and the **water ran short, the preference should be given first to domestic purposes**, household use, **and next to agricultural purposes, because if crops were in progress, being green, and the water was taken away for mining purposes, the crop would be entirely lost**. That is the reason why the committee saw fit to state it in that manner.

Id. at 1115 (emphasis mine).

Various amendments to the original version of section 3 were proposed and considered by the Committee of the Whole Convention.[13] These included a motion to strike the entire section, two proposed additions to the section which were ultimately approved, several proposed amendments that were ultimately rejected, plus an additional section was proposed but also rejected. However, and distilled to their essence, they were (again, not in the exact order proposed):

1. **Motion to strike all of Section 3 as originally drafted.**

This motion was offered by Mr. Beatty. Proceedings and Debates at 1116. This motion was withdrawn a short time later. Id. at 1122.

2. **Motion to strike "for the same purpose."**[14]

[13] The amendments, and more particularly the debate and discussion thereon, were not neatly confined and taken in order. As such, they are not stated here in the exact order presented in the debate.

[14] Following the adoption of the Motion to strike these four words, this "for the same purpose" language was again discussed by the whole Convention at various places. Including id. at 1331-33, 1358.

It was moved by Mr. Ainslie to strike the words "for the same purpose" from the second sentence of section 3 as originally reported. Id. at 1121-22. This would cause the proposed section to read like this:

> The right to appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water ~~for the same purpose~~; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

As to Mr. Ainslie's amendment to strike "for the same purpose," Mr. Poe attempted to defend the inclusion of this language, "for the same purpose" in Section 3 and argued the included language was necessary as follows:

> ***
>
> **What this law is intended to get at** is that the man who takes water for manufacturing purposes, and appropriates that water while it is running along there in his ditch, has the right to the use of it during the time it is passing through his ditch. The moment it leaves his ditch it becomes subject to relocation. Now, what I claim, Mr. Chairman is this: **that so long as that man uses that water for the purpose for which he took it out of its original bed**, to-wit: for the purpose of manufacturing, **he has the right to use that water for that purpose.** So, if he has taken it out for mining purposes he has the right to use it for that purpose; and if he has taken it out for irrigation purposes, he has the right to use it for that purpose; **but the moment** the manufacturer might conceive of a time when he could make the water more profitable for irrigating purposes than for manufacturing purposes, then he loses his priority right as a manufacturer, because **he undertakes to appropriate it for a purpose which he never intended when he took it, and his priority right does not come in**, and those men who have located along the line of that ditch then step in and say 'here, we are first entitled to the use of this for agricultural purposes.' We do not propose that we shall take the ditch away from him; the right to his work can never be forfeited; but the water was taken for a specific use, the use of manufacturing. He now undertakes to say that he has a priority right to use that water for another purpose; **but the law, and in my opinion is that this article, if it is adopted, will**

> confine him to the use for which he originally took it; and I am satisfied, Mr. Chairman, that if this article is adopted it will be of great benefit. **There is no use in talking about depriving a man of a vested right; you cannot do that, however much you may attempt it. The only attempt here made is this: that that man having taken water for manufacturing purposes, so long as he uses it for that purpose and that alone he has a priority right, but if he should attempt to appropriate it for another purpose, then his priority right would be gone.**

Id. at 1128-29, see also id. at 1139 (emphasis mine).

Mr. Ainslie then defended his motion to strike "for the same purpose" as follows:

> The CHAIR. **The question is upon the amendment** offered by the gentlemen from Boise **to strike out the words 'for the same purpose.'**
>
> Mr. AINSLIE. The gentleman from Cassia county, as I understand, says the supreme court of California refers to that matter. I never knew a decision in the supreme court of California or any other mining state or territory that refers to any such thing as that. All statements go to the proposition that priority of appropriation of water for any beneficial purpose whatever gives the best right. That principle is recognized by the supreme court of every mining state and territory of the United States. Now, sir, **the reason I want to strike out 'for the same purpose' is this: that there may be a conflict of the right to the water between** manufacturing and agricultural **purposes** and for mining purposes. **And I say that we are going to sustain the doctrine of he who is first in point of time is stronger than he who is best in right. That is the only correct doctrine that can be maintained.** If a person owns water for mining purposes, and only uses it for three or four hours of the day, *if he is not using that water*, anybody in God's world has the right to use it when he is not using it. Nobody contradicts that right, and that has nothing to do with striking out '**for the same purpose**;' but that **confines it to three of four purposes**. If a person takes water for mining purposes upon the same stream that is already appropriated, then the prior appropriator has priority over the subsequent appropriator for the same purpose. And if a person takes it out for mining purposes, and another person comes and takes it for mining or for agricultural purposes, subsequent to that time, **there is a conflict at once between those two parties, and if you strike out those four words, 'for the same purpose,' it places them all upon the same level with the qualifying words following.** 'But when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have preference over those claiming for any other purpose.' That does not conflict by striking those four words out; nor does it conflict by

> giving the agriculturist priority over the manufacturer. **But it recognizes to the fullest extent the priority of appropriation by any person who has taken the water; and that I believe is the true doctrine in these mining countries and all countries on the Pacific Coast. That is the reason I ask to have those four words struck out. It does not affect the matter at all, except the way it is there now it confines priority of appropriation between persons of the same class**: priority between men who have appropriated for mining purposes, and priority between men who have appropriated for agriculture, but does not give priority of appropriation by the miner any preference over priority of appropriation for manufacturing or agricultural purposes, and that is what I insist on, no matter what the rights are if the use is for beneficial purposes.

Proceedings and Debates at 1156-57 (italicized emphasis original, bold emphasis mine).

> ('Question, question.')
>
> The vote was taken upon the question of the amendment offered by Mr. Ainslie to strike out the words 'for the same purpose' in the third line.
>
> (Division demanded. On the rising vote, ayes 18, nays 11, and the amendment was carried.)

Id. at 1158.

3. **Motion to strike most of Section 3 as originally drafted.**

Judge Morgan moved to strike out all of Section 3 after the word "denied" in line 2, and insert "and those prior in time shall be superior in right." Id. at 1122. This would have caused the proposed Section 3 to read:

> The right to appropriate the unappropriated waters of any natural stream to beneficial use shall never be denied and those prior in time shall be superior in right. ~~Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.~~

A part of the debate on this amendment went as follows:

> SECRETARY reads: Strike out all of Section 3 after the word 'denied' in the second line, and insert, 'and those prior in time shall be superior in right.'
>
> ***
>
> Mr. CLAGGETT. I would suggest to my colleague that that matter is passed upon already. The very sentence says: 'Priority of appropriation shall give the better right as between those using the water.' By striking out 'for the same purpose' it leaves it just the same.
>
> ('Question, question.')
>
> The vote was taken on the adoption of the amendment. Lost.

Id. at 1158.

4. **Motion to strike out the preference for agricultural purposes over manufacturing purposes.**

Mr. Wilson proposed two amendments. The first Wilson Motion was to strike out all of Section 3 after the word "purpose" in line 7. Id. at 1118-19, 1121. Mr. Wilson's explanation is on pages 1118-19. This would have caused the proposed Section 3 to read:

> The right to appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as prescribed by law) have the preference over those claiming for any purpose~~; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes~~.

This motion was withdrawn, as stated in the next section. Id. at 1127.

5. **Motion to insert "power or motor."**

During the discussion of his proposed amendment to strike out the preference for agricultural purposes over manufacturing purposes stated immediately above, Mr. Wilson withdrew that Motion, and in its place, offered still another amendment. This amendment was to insert the words "power or motor" after the word "manufacturing" in line 8. Id. at 1126. The Wilson amendment would have caused Section 3 read like this:

> The right to appropriate the unappropriated waters of any natural stream to beneficial use shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing power or motor purposes.

The voting on this amendment went as follows:

> SECRETARY reads: Insert the words 'power or motor' after the words 'manufacturing' in line 8, section 3. (Vote.)
>
> A division was demanded. On the rising vote ayes 4, and the amendment was lost.

Proceedings and Debates at 1158.

6. **Motion to insert "riparian rights" related to irrigation.**

Following further debate, an amendment was offered by Mr. Vineyard. That amendment was:

> Mr. VINEYARD. I have sent to the clerk's desk an amendment which I desire to have read. I am in favor of this section [original version of Section 3 as it was reported out of committee] as it stands with the addition of that amendment.
>
> SECRETARY reads: Add in line 8 after the word 'purposes' the following: 'but no appropriations shall defeat the right to a reasonable use

> of said water by a riparian owner of the land through which said water may run.'
>
> Mr. VINEYARD. I want to add to my amendment after the word 'use' the following, 'for irrigation.'

Id. at 1131. Thus, Mr. Vineyard's proposed amendment would have caused Section 3 to read as follows:

> The right to appropriate the unappropriated waters of any natural stream to beneficial use shall never be denied. Priority or appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes but no appropriations shall defeat the right to a reasonable use for irrigation of said water by a riparian owner of the land through which said water may run.

Mr. Vineyard defended his motion and a portion of the debate on Mr. Vineyard's riparian amendment went as follows:

> Mr. VINEYARD.
>
> ***
>
> **Now, there is an effort here to make every other right to the use of water secondary to its use for agricultural purposes, notwithstanding the time of its appropriation.** That is the effect of this amendment. Priority of right is governed by priority in time, except in instances here specified. **Now, if the doctrine of appropriation is to obtain in this territory absolutely, it will be for this convention to announce that doctrine as against the doctrine of the right of the riparian owner for the use of the waters for irrigation, which would be cut off here.**

Id. at 1131 (emphasis mine).

> Mr. VINEYARD. **But suppose the doctrine of appropriation obtains here. A man who gets a patent from the government to his land, although he has no appropriation, somebody has appropriated the**

water of that stream, either above or below, and claims another use of the stream; **what becomes of the rights of the owner of the land?**

Mr. POE. Let me ask you a question right there. Suppose that water had been appropriated by some party prior to the time that he located that land. Now, I will ask you if he does not have to take that land as he found it?

Mr. VINEYARD. **He takes under the act of congress of 1866; but no vested water rights.**

Mr. POE. **That water has been appropriated.**

Mr. VINEYARD. That is, for the purpose for which it had been appropriated, and no other purpose.

Mr. POE. **But he has no right to go and take that water out of that stream just because he does live along the stream, subject to that right.**

Id. at 1132 (emphasis mine).

Mr. VINEYARD.

***

Would he have the right to do it to the exclusion of the riparian owner along the banks through which the water ran, or **could that water be taken absolutely away? It could be if you engraft in the constitution here that the doctrine of appropriation shall have precedence to the doctrine of the common law upon the subject of riparian ownership.** That is the second effect of it.

Mr. AINSLIE. Will the gentleman allow me to ask him a question?

Mr. VINEYARD. With pleasure.

Mr. AINSLIE. If the waters of a stream are already appropriated and taken out, how could the man go to the head of that ditch, who never had any riparian rights or ownership?

Mr. VINEYARD. I am not talking about a ditch, Mr. Ainslie. I am taking about a natural channel, not about artificial ditches. I am talking about a stream like the Boise river where it flows through his ranch or farm. **Can a man by prior appropriation exclude the riparian owner of the land through which that stream runs from a reasonable use of the water**

> for irrigation? I say no, unless you overturn the common law. That is all there is to it. I want that added by this amendment.

Id. at 1133 (emphasis mine).

Mr. Vineyard's riparian amendment was not well received as illustrated by some of the following comments:

> Mr. ALLEN.
>
> ***
>
> For if we take the proposition of the gentleman who has just taken his seat (Mr. VINEYARD) we throw aside all the experience of California, Utah and Colorado and go back to the primitive age when riparian doctrine was first established.

Id. at 1134.

> Mr. McCONNELL
>
> ***
>
> **Now, in regard to this riparian right business**, I had my attention called to a question since I have been here, on that subject; and as I told the gentlemen of the committee, **that was very largely what was the occasion of calling of the late constitutional convention in California. They found that under those claims of riparian right large capitalists were crushing out the poor settlers, and there was a clamor for a constitutional convention that this thing might be regulated**, so as to give every many an equal show. I believe I had the first irrigating ditch that was ever taken out of the waters for this or Boise county for irrigating purposes, and under the plea of riparian rights today one of the finest farms in Boise county is left a desert after the crop was planted and grown. **Parties came in above, and under the claim of riparian rights, diverted the water, and the man who has been cultivating the land and using that water for twenty-six years is today deprived of it and is compelled to go into the courts, and probably spend as much in litigating for what should be his vested rights, what every man would admit are his vested rights, as the farm is worth**...

Id. at 1137 (emphasis mine).

Further debate and voting on this amendment continued as follows:

> Mr. CLAGGETT. That same doctrine of priority protects the riparian owner, provided he takes up his land first; and as said by the gentleman from Ada, if all the water is taken out and applied upon their land then when a man comes and takes up the land and finds that the water is all gone, he takes the land subject to the other man's rights.
>
> Mr. GRAY. **He takes it as he finds it.**
>
> Mr. CLAGGETT. **Certainly.**
>
> The CHAIR. The question is on the amendment offered by the gentleman from Alturas. (Vote and lost).

Proceedings and Debates at 1161 (Emphasis mine).

7. **Motion to insert "Compensation for taking by subsequent appropriator."**

Mr. Ainslie then offered the following amendment, his second, to Section 3:

> SECRETARY reads: Continue Section 3 as follows: 'but the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use as referred to in Section 14 of Article 1 of this Constitution. [Sic]

Id. at 1145. Mr. Ainslie's two proposed amendments to Section 3 would now make the section read:

> The right to appropriate the unappropriated waters of any natural stream to beneficial use shall never be denied. Priority of appropriation shall give the better right as between those using the water ~~for the same purpose~~; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes, but the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use as referred to in Section 14 of Article 1 of this constitution.

The discussion on this amendment went in part as follows:

> Mr. AINSLIE. I will explain that, Mr. Chairman, that in the Bill of Rights the other day in regard to private property and prior appropriation of

> water, is inserted private property for public as well as private uses, but private use is denominated as public use in Article 14. The article was amended so that I have not got the fully text of it.
>
> **If we recognize the principle of priority of rights, which is practically the law, and not only the law, but common sense also, and** ***if we can by this provision of the irrigation law provide that persons may have prior right to the use of water for agricultural purposes, notwithstanding the prior appropriation by persons who want the same for manufacturing purposes***, if the manufacturer has the prior right ***he ought to receive compensation for the use of his water*** **by agriculturalists** under Article 14 of the Bill of Rights. ***And that would go to the question of taking private property and giving it to another without giving anything for it. By protecting the prior appropriator and recognizing his right, he would be entitled to compensation if he was shut down in order to allow the agriculturists to cultivate their farms.*** **Let them pay the manufacturer for the use of the water.**

Id. at 1145-46 (both bold and italicized emphasis mine). Then, the final debate on this provision went as follows:

> Mr. AINSLIE. I would like to have the committee on Irrigation and Mining accept that amendment.
>
> Mr. ALLEN. That chairman is not present, but for one, so far as the idea corresponds with that in the Bill of Rights, I think there would be no objections.
>
> Mr. AINSLIE. **That would secure all their constitutional rights**, and I move the adoption of it.
>
> Mr. GRAY. Wouldn't it be proper to be in the next section?
>
> Mr. CLAGGETT. So far as that matter is concerned, I think that whole subject is covered by sections 5 and 6, so far as it ought to be covered. **I don't believe there should be absolute priority in irrigation by any claimants, but let that right be limited as it is here, and in the other sections, so that when the first man comes in and takes up the water he is not going to be allowed to play the dog-in-the-manger policy.** There may in ordinary years enough water to supply all of the people that settle along a ditch or canal, which is being distributed, but **when there comes a dry season, is one-half of the farms to be absolutely destroyed because the other man has an absolute priority, or is there to be an equitable distribution under such rules and regulations as may be provided in law?** Sections 5 and 6 deal specifically with that question.

> Mr. GRAY. I say, Mr. Chairman, that the man first in time is first in right. **If he were there first, and the water is short, it is his. If there is more than he wants, he shall not be allowed to play the dog-in-the-manger policy.** That is, if he does not need the water, as a matter of course, the general law will keep him from doing that; but if he was there first, he shall be first served, and when he has supplied his needs, then his neighbors below him can be supplied, and so on down.
>
> Mr. AINSLIE. **I have read these sections carefully, and it is not provided for in any other section; but if you contemplate making the agricultural interests of the territory superior to the manufacturing interests, as proposed in the section as it stands, without this amendment,** then any person, who has appropriated water for manufacturing purposes alone, and is using it for that, and during a dry season the water becomes scarce, the farmers below the line of that ditch, if they have build another ditch appropriating those same waters, **could deprive the manufacturer of his prior right to that water, deprive him of a prior appropriation without compensation.** I go this far in a conservative way, and say while we may give them a prior right to use the water if there is not enough for the agriculturist and the manufacturer both, **give the agriculturist a prior right to the use of the water, but include in section 14 of your Bill of Rights that he shall pay the manufacturer for its use.**
>
> ('Question, question.')
>
> Vote on the question of the amendment offered by the gentleman from Boise. Division. On the rising vote, ayes 13, nays 12. And the amendment was adopted.

Id. at 1161-63 (emphasis mine).

8. **Motion to establish preferences "in any organized mining district."**

Mr. Heyburn offered an amendment to Section 3 relating to mines. It provided:

> SECRETARY reads: Amend section 3 by adding after the last word 'in any organized mining district those using the water for mining purposes or for milling purposes connected with mining shall have preference over those using the same for manufacturing or agricultural purposes.'

Id. at 1148. This amendment would make Section 3, as originally reported out of the standing committee, read as follows:

> The right to appropriate the unappropriated waters of any natural stream to beneficial use shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. In any organized mining district those using the water for mining purposes or for milling purposes connected with mining shall have preference over those using the same for manufacturing or agricultural purposes.

The voting on this amendment went as follows:

> The CHAIR. The question is on the amendment offered by the gentlemen from Shoshone.
>
> Mr. STANDROD. I would like to have the amendment read.
>
> SECRETARY reads Mr. Heyburn's amendment.
>
> ('Question, question.')
>
> Rising vote taken; ayes 21, nays 6; and the amendment was adopted.

Proceedings and Debates at 1166.

9. **Finally, an additional [or new] section was proposed.**

> ADDITIONAL SECTION PROPOSED [to apply within an organized mining district]
>
> Mr. HEYBURN. Mr. Chairman, I desire to propose, following that, a new section.
>
> SECRETARY reads: 'Where land has been located along or covering any natural stream for any purpose, which contemplates the use of the water of such stream, then no person shall be permitted to take the water from said

stream at a point above the land so located to the exclusion of such locator after such location.'

***

Mr. HEYBURN. It should follow the mining section because it is intended to apply to this.

Id. at 1166.

Mr. CLAGGETT. I do. I see a multitude of points that do not lie in the bill, they lie on the outside. **We have sacrificed the doctrine of riparian ownership to the doctrine of appropriation for agricultural purposes.**

***

We have done that by the consent of the entire convention. Now what does my friend want? He wants to reserve and preserve the doctrine of riparian ownership as to mining claims, ... and when somebody has come along and taken the water to some beneficial use in the matter of mining, then by reason of the right of riparian ownership this original claim owner can demand that that water be turned on to him at any time. Now, I say that the doctrine of priority appropriation should govern in all particulars which are absolutely necessary and which we have provided for here.

Id. at 1169 (emphasis mine).

('Question, question.')

The vote was taken on Mr. Heyburn's proposed section and the motion was lost.

Id. at 1176.

10. **Section 3 adopted as amended.**

Mr. CLAGGETT. I move the adoption of Section 3 as amended (Seconded. Vote and carried).

Id. at 1176; see also id. at 1183.

Following the above actions by the Convention, Article 3 then read:

> Sec. 3. The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring to use of the same, those using the water for domestic purposes shall, (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose. And those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district, those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public [use] and private use, as referred to in Section 14 of Article I of this Constitution.

On July 26, the nineteenth day of the Convention, the entire Article XV, including the above version of Section 3, was then voted upon and adopted. Proceedings and Debates at 1183-85.

On July 27, 1889, "Article XV – Agriculture and Irrigation" was presented to the whole Convention for its final reading and its adoption was moved. Id. at 1237. At this point, further debate was sought, but a vote was taken instead, and Article XV was adopted and sent to the Committee on Revision to become one of the articles in the Constitution. Id. at 1237-39.

11. **Renewed Motion to grant preference for domestic use only.**

However, the debate on Section 3 of Article XV was far from being over. On July 29, the twenty-first day of the Convention, it was again moved to amend the then existing Section 3 by:

1. eliminating all use preferences except for domestic use; and
2. to strike or eliminate the "compensation for taking by a subsequent appropriator" provision and the "organized mining district" provision which had been added/adopted three (3) days earlier on July 26.

Id. at 1330-34.

The proposed amendment of July 29 was for Section 3 to read as follows:

> The CHAIR. The secretary will now read the substitute proposed by the gentleman from Shoshone.
>
> SECRETARY reads: 'The right to divert and appropriate the unappropriated waters of any natural stream to beneficial use shall never be denied. Priority of appropriation shall give the better rights as between those using the water, but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall, subject to such limitations as may be prescribed by law, have preference over those claiming for any other purpose.'

Id. at 1340-41.

After significant and spirited debate spread over some additional thirty-four (34) pages of the reported proceedings (pages 1330-1364), the renewed motion to amend Section 3 raised on July 29 failed. Section 3 remained as it was previously adopted on July 26, 1889, and as ultimately reported in the original Constitution. Id. at 1364, 1365, 2079, 2080.

12. **Summary**

In an effort to summarize the relevant parts of the debate relating to Section 3, as it relates to the issues in the present suit, the concerns fell into three fairly distinct categories.

First were the policy reasons for establishing the express preferences in times of scarcity between the competing uses of domestic, agriculture, and manufacturing (including water used for power generation to operate plants and mills) in Idaho's version of the prior appropriation doctrine, with a primary one being the recognition of the need for timely administration to protect growing crops.

The second was, having resolved that in times of scarcity some preference for the purpose of water use should be placed in the Constitution, how to protect the senior vested property rights created by the prior appropriation doctrine; i.e. compensation for any taking by a preferred use.

Third was whether any riparian rights should be established. The issue was brought up twice, once relative to agriculture, and once relating to mining. Notions of riparian or "equal" standing were strongly rejected each time.

VI. Article XV, §§ 4 and 5.

Sections 4 and 5 were adopted as follows:

SECTION 4

> Whenever any waters have been, or shall be appropriated, or used, for agricultural purposes, under a sale, rental, or distribution thereof, such sale, rental, or distribution shall be deemed an exclusive dedication to such use; and whenever such waters, so dedicated, shall have once been sold, rented or distributed to any person who has settled upon, or improved land for agricultural purposes, with the view of receiving the benefit of such water under such dedication, such person, his heirs, executors, administrators, successors, or assigns shall not thereafter without his consent, be deprived of the annual use of the same, when needed for domestic purposes, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use, as may be prescribed by law.

Proceedings and Debates at 2080.

SECTION 5

> Whenever more than one person has settled upon, or improved land with the view of receiving water for agricultural purposes, under a sale, rental, or distribution thereof, as in the last preceding section of this article, provided, as among such persons, priority in time shall give superiority of right to the use of such water in the numerical order of such settlements or improvements; but whenever the supply of such water shall not be

> sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used, and times of use, as the legislature, having due regard, both to such priority of right, and the necessities of those subsequent in time of settlement or improvement, may by law prescribe.

Id.

The adoption and the intent of the framers with respect to what are now sections 4 and 5 of the Constitution are most easily expressed by simply quoting from the Idaho Supreme Court.

In Mellen v. Great Western Belt Sugar Co., 21 Idaho 353, 122 P. 30 (Idaho 1913), the Idaho Supreme Court discussed the meaning of Sections 4 and 5 as follows:

> **The framers of our constitution evidently meant to distinguish settlers who procure a water right under a sale, rental or distribution from that class of water users who procure their water right by appropriation and diversion directly from the natural stream. The constitutional convention accordingly inserted secs. 4 and 5, in art. 15, of the constitution, for the purpose of defining the duties of ditch and canal owners who appropriate water for agricultural purposes** to be used 'under a sale, rental or distribution' and to point out the respective rights and priorities of the users of such waters. **It was clearly intended that whenever water is once appropriated by any person or corporation for use in agricultural purposes under a sale, rental or distribution, that it shall never be diverted from that use and purpose so long as there may be any demand for the water and to the extent of such demand for agricultural purposes.** And so sec. 4 is dealing chiefly **with the ditch or canal owner, while sec. 5 is dealing chiefly with the subject of priorities as between water users and consumers who have settled under these ditches and canals and who expect to receive the water under a 'sale, rental or distribution thereof.' The two sections must therefore be read and construed together.**
>
> It is plain that the framers of the constitution in the adoption of sec. 5 meant to date the priorities of claimants from the time of 'settlement or improvement.' That is to say, that one who improves his land with a view to receiving water for the irrigation thereof and who proceeds with diligence and in good faith to put his land in condition for irrigation, is entitled to have his priority date from the time he commenced to make such improvement. So, also, one who actually settles upon such land and proceeds with diligence and in good faith to prepare his land for irrigation is entitled to have his priority date from the time of such settlement. One who purchases a water right for his land from such canal or ditch company

is placed upon exactly the same footing as any other user of water under that canal system. His priority cannot date from the time of his purchase of such water right, but must date from the time he either settles upon the land or from the time he begins to improve the land for irrigation.

So it will be seen that the purchaser of a water right from a canal company is in no better condition than he would have been had he not purchased such a right, for the reason that he still is obliged to either settle upon or improve the land the same as one who has never purchased a water right.

The effect of these two sections of the constitution was discussed somewhat by the members of the constitutional convention. Mr. Gray and Mr. Hampton both protested that they did not understand the purpose of the committee in drafting sections 4 and 5, and that they did not understand the meaning intended to be conveyed thereby. **The president of the convention, Mr. Claggett, on the other hand, seemed to have a very clear understanding of the provisions and was the only one who spoke in favor of their adoption, and his discussion and explanation seems to have been accepted by the majority of the convention as they voted down the amendments presented by Gray, Hampton and Poe, and adopted the provisions as they now stand. We quote the following** as a part of the debate and proceeding had in this connection:

> Mr. Claggett: I will state to the committee that he heart of this bill lies in sections 4 and 5 as a practical measure. This portion of section 4 amounts to this: that whenever these canal owners – if the gentleman will see, 'for agricultural purposes under a sale, rental or distribution thereof,' – whenever one of these large canals is taken out for the purpose of selling, renting or distributing water, or the appropriation is made hereafter for that purpose, and that after that has once been done, inasmuch as priorities will immediately spring up along the line of that canal, even before the canal is located; for instance, if a company should start in here to take a large quantity of water out to supply a given section of country, and should appropriate or give notice to the world that they were appropriating it for agricultural purposes 'under a sale, rental or distribution thereof,' then immediately, just as soon as the ditch was surveyed, people would come in and begin to locate farms and improve them right along the line of that ditch; and therefore it is necessary in order to protect them, inasmuch as they have spent this money in settling there under a promise, which was made by the company, that the water should be used for agricultural purposes, that the water should not be allowed to be diverted from that purpose and

> applied to the running of manufactories or anything else of that sort.
>
> Mr. Gray: Suppose he won't pay for it.
>
> Mr. Claggett: It is dedicated to the use, and when it has once been sold to any one particular party in one year, then he have the right to demand it annually thereafter upon paying for it...
>
> Mr. Claggett: Mr. Chairman, **both of these sections apply to the same condition of things. Neither one of them applies to a case of a water right where a man takes water out and puts it upon his own farm. It applies to cases only as both sections specify, say to those cases where waters are 'appropriated or used for agricultural purposes under a sale, rental or distribution.'** The first section protects the person who comes in, by making it 'an exclusive dedication' to agricultural uses after it has been so appropriated and so used.

These conditions necessarily result in an affirmance of the judgment as to those appellants who rely on contracts for water rights from the irrigation and canal company, and who do not connect themselves with an original appropriation of the water from the natural stream.

Mellen, 21 Idaho at 359-61 (emphasis mine).

VII. Article XV, § 6.

Section 6 was adopted as follows:

SECTION 6

> The legislature shall provide by law, the manner in which reasonable maximum rates may be established to be charged for the use of water, sold, rented, or distributed, for any useful or beneficial purpose.

Proceedings and Debates at 2080.

This section imposes a duty on the legislature to provide the method or means for fixing compensation for supplying water to any city or town, and until the legislature provides such a

method, the contract rates for such supply will be enforced. Section 6 is not at issue in the present case.

VIII. Article XV, § 7 -- Creation of a State Water Resources Conservation Agency.

The meaning of section 7 is at issue in this case because of CMR Rule 20.03. Then Governor Robert E. Smylie convened an extraordinary session of the Idaho Legislative during July of 1964 for six (6) purposes. One of those was:

> 1. To consider the passage of, and to enact, a resolution submitting a constitutional amendment to the people of Idaho providing for the creation of a water resources conservation agency;

See Proclamation, Session Laws of Idaho, 1965.

As originally proposed, and then adopted, § 7 read as follows:

> (S.J.R. No. 1)
>
> A JOINT RESOLUTION
>
> PROPOSING AN AMENDMENT ADDING A NEW SECTION, SECTION 7, TO ARTICLE 15 OF THE CONSTITUTION OF THE STATE OF IDAHO CREATING A WATER RESOURCE AGENCY COMPOSED AS THE LEGISLATURE MAY NOW OR HEREAFTER PRESCRIBE, WITH POWER TO FORMULATE AND IMPLEMENT A STATE WATER PLAN, CONSTRUCT AND OPERATE WATER PROJECTS, ISSUE REVENUE BONDS, GENERATE AND WHOLESALE HYDROELECTRIC POWER, APPROPRIATE PUBLIC WATER, TAKE TITLE TO STATE LANDS AND CONTROL STATE LANDS REQUIRED FOR WATER PROJECTS.
>
> *Be It Resolved by the Legislature of the State of Idaho:*
>
> SECTION 1. That the Constitution of the State of Idaho be amended by adding Section 7 to Article 15 to read as follows:
>
> SECTION 7. STATE WATER RESOURCE AGENCY.—There shall be constituted a Water Resource Agency, composed as the Legislature may now or hereafter prescribe, which shall have power to formulate and

> implement a state water plan for optimum development of water resources in the public interest; to construct and operate water projects; to issue bonds, without state obligation, to be repaid from revenues of projects; to generate and wholesale hydroelectric power at the site of production; to appropriate public waters as trustee for Agency projects; to acquire, transfer and encumber title to real property for water projects and to have control and administrative authority over state lands required for water projects; all under such laws as may be prescribed by the legislature.
>
> SECTION 2. That the question to be submitted to the electors of the State of Idaho as the next general election shall be as follows:

Id. at 72.

The section was ratified by the people of Idaho voting in the general election of November 3, 1964. Section 7 has been amended once as proposed by S.J.R. No. 117 (S.L. 1984, p. 689) as follows:

> Be It Resolved by the Legislature of the State of Idaho:
>
> SECTION 7. STATE WATER RESOURCE AGENCY. There shall be constituted a Water Resource Agency, composed as the Legislature may now or hereafter prescribe, which shall have power to ~~formulate and implement a state water plan for optimum development of water resources in the public interest; to~~ construct and operate water projects; to issue bonds, without state obligation, to be repaid from revenues of projects; to generate and wholesale hydroelectric power at the site of production; to appropriate public waters as trustee for Agency projects; to acquire, transfer and encumber title to real property for water projects and to have control and administrative authority over state lands required for water projects; all under such laws as may be prescribed by the Legislature. Additionally, the State Water Resource Agency shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest. The Legislature of the State of Idaho shall have the authority to amend or reject the state water plan in a manner provided by law. Thereafter any change in the state water plan shall be submitted to the Legislature of the State of Idaho upon the first day of a regular session following the change and the change shall become effective unless amended or rejected by law within sixty days of its submission to the Legislature.

Id. at 689-90. The amendment was ratified at the general election of November 6, 1984 to read as it now appears.